UMW INDUSTRIES [1985] SDN. BHD. & ANOR.

v.

SYKT. MACHINCO GENERAL AGENCY (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. C 5995 OF 1985]
3 JUNE 1989

CIVIL PROCEDURE: *Application for leave to file a notice of appeal to a Judge in chambers out of time - Application filed 1½ months after judgment - Whether Court should exercise its discretion under O. 3 r. 5 Rules of the High Court 1980.*

On 14 April 1987, the plaintiffs obtained an order before the Senior Assistant Registrar for leave to enter final judgment. It was only on 4 June 1987 that the defendant filed a summons before a Judge in chambers to apply for leave to file a notice of appeal to a Judge in chambers out of time.

In his affidavit, the managing director of the defendant averred that the solicitors did write to the defendant on 15 April 1987 to inform it of the outcome of the O. 14 application but he stated that he was not available at the relevant period as he was on board a ship at Port Kelang supervising employees. He further stated that on 22 April 1987 he immediately rang up his solicitors to instruct them to file a notice of appeal to the Judge in chambers. The said notice of appeal was finally sent to the High Court Registrar with an endorsement that "this notice of appeal is filed out of time and no leave to appeal out of time has been obtained."

The summons was heard in chambers and the application was dismissed with costs. This was a hearing of further arguments in open Court on the said application.

Counsel for the defendant contended that there would be great injustice if the Court did not grant an extension of time to the defendant. Counsel for the plaintiffs pointed out that the defendant was a company and that even if the managing director was not available, other officers of the company were available. He also pointed out that the defendant's application for extension of time was filed about 1½ months after judgment was obtained against the defendant.

Held:

[1] This was a case where the Court should not exercise its discretion under O. 3 r. 5 of the Rules of the High Court 1980 and therefore the decision in chambers dismissing the defendants application with costs is confirmed.

[Application dismissed with costs.]

Case referred to:
Revici v. Prentice Hall Incorporated & Ors. [1969] 1 All ER 772

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5

For the defendant/appellant - Ram Singh; M/s. Ram, Rugber, Biliwi & Co.
For the plaintiffs/respondents - L.T. Chia; M/s. Skrine & Co.

JUDGMENT

Gunn Chit Tuan J:

On 14 April 1987, the plaintiffs in this case obtained an order before the Senior Assistant Registrar for leave to enter final judgment against the defendant abovenamed for the sum of RM113,776.64 together with interest on the sum of RM89,027.14 at the rate of 1.5 per cent per month from the first day of April 1985, to the date of payment and costs of RM369. It was only on 4 June 1987, that the defendant filed a summons before a Judge in chambers, but not before the Senior Assistant Registrar, to apply for leave to file a notice of appeal to a Judge in chambers out of time.

In an affidavit affirmed by one Phung Hoe Seng @ Phang Hoe Seng, the managing director of the defendant, it was averred that the solicitors did write to the defendant on 15 April 1987, to inform it "of the outcome of the O. 14 application". The deponent however stated that he "was not available at the relevant period as I (*sic*) was on board a ship at Port Kelang supervising my employees as to bunkering, etc.". He further stated that on 22 April 1987, he "immediately" rang up his solicitors to instruct them to file a notice of appeal to the Judge in chambers. The said notice of appeal was finally sent to the High Court Registrar on 23 April 1987, but was rejected by the High Court Registry with an endorsement that "this notice of appeal is filed out of time and no leave to appeal out of time has been obtained".

The said summons was heard by me in chambers on 27 September 1987, when, I, having heard arguments from both sides, dismissed the application with costs. The defendant's Counsel asked for further arguments in open Court and I allowed his application.

Due to some oversight, the date for further arguments was not fixed until 16 March 1989. On that day, Mr. Ram Singh, Counsel for the defendant, merely contended that there would be great injustice if the Court did not grant an extension of time to the defendant to file a notice of appeal out of time but did not say or show what the alleged injustice would be. He again referred to O. 3 r. 5 of the Rules of the High Court 1980, and stated that it was an unfettered discretion of the Court whether to grant an application for leave to file a notice of appeal from the Registrar to the Judge in chambers.

Mr. D.T. Chia, Counsel for the plaintiffs, pointed out that when the defendant filed his notice of appeal out of time he did not file any application for extension of time. As regards the conduct of the defendant, Counsel pointed out that it is a company and stated that even if the managing director of the defendant was not available, other officers of the company were available. He also pointed out that the company was informed of the judgment obtained against it and yet took no action. Counsel then referred to the case of *Revici v. Prentice Hall Incorporated & Ors.* [1969] 1 All ER 772 in which the English Court of Appeal held that there would be no extension of time of appeal, because - (i) the rules of the Court must be observed and it mattered not that the plaintiff had offered to pay the costs and that no injustice would be done to the other side; (ii) if there was non-compliance with the rules it must be explained; and *prima facie* if no excuse was offered no indulgence should be granted.The appeal was dismissed. Counsel referred specifically to the following passage in the judgment of Lord Denning MR:

> Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasions recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered).

Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3½ months in which to lodge his notice of appeal to the Judge and he did not do so. I am quite content with the way in which the Judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.

Mr. Chia then pointed out that the defendant's application for extension of time dated 4 June 1987, was filed about 1½ months after judgment was obtained against the defendant.

Having heard further arguments and having taken the opportunity to reconsider all the circumstances of this case, I again considered that this was a case in which the Court should not exercise its discretion under O. 3 r. 5 of the Rules of the High Court 1980, and therefore confirmed my decision in chambers on 29 September 1987, dismissing the defendant's application with costs.

Also found at [1989] 2 CLJ 732